Before The

Federal Communications Commission

Washington, D. C.

In The Matter Of:	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-259
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

REPLY COMMENTS OF PRIMETIME 24

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TABLE OF CONTENTS

SUMMARY

PrimeTime 24 suggests that Commission regulation in this matter should be guided by the fundamental premise that continued and expanded distribution of broadcast television programming be promoted for all American households under the mandate of the 1992 Cable Act and existing copyright law.

PrimeTime 24 is responsible for the delivery of network broadcast television to approximately 400,000 cable households in the states, trusts, territories and possessions of the United States. Well over half of those homes are located in Puerto Rico and the U.S. Virgin Islands. Without restrictions on the withholding of consent to the retransmissions of the signals of network affiliates to those cable subscribers, there is a high likelihood that network service to those households will be terminated.

The plain language of Section 325, as amended by the 1992 Cable Act, supports the PrimeTime 24 interpretation that only "originating stations" have standing to grant or withhold retransmission consent. Past treatment of retransmission consent rights under Section 325 of the 1934 Communications Act comports with that position. The legislative history of the 1992 Cable Act clarifies and confirms that conclusion, and the overall purpose of the 1992 Cable Act is furthered by that limitation. Support for all of the foregoing is discussed in detail in the existing record in this proceeding.

Any involvement of program suppliers in the consent decisions of originating stations would modify the Cable Compulsory License in violation of the proscriptions of Section 325 (b)(6) and effectively gut the workings of that license, all to the detriment of thousands of Americans who depend on satellite delivered network programming as their only source of ABC, CBS and NBC news, sports and entertainment. Public interest will only be properly served by the elimination of any possible involvement of program suppliers in the retransmission consent procedures addressed in this rule making.

Finally, the suggestion by the broadcasting industry that rules are now necessary for the treatment of claims of broadcasters that satellite carriers have violated the terms and conditions of the Satellite Home Viewer Act of 1988 are unwarranted. There is no present need for such regulation, and the attempt by the broadcasting community to convince the Commission otherwise should be considered for what it is - an attempt to blatantly rewrite the terms of current copyright law under the guise of implementing an non-existent telecommunications-based right of action.

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REPLY COMMENTS OF PRIMETIME 24

I. Need For Restrictions on "Retransmission Consent" Rights

In its initial Comments, PrimeTime 24 suggested that Commission regulation in this matter should be guided by the fundamental premise that continued and expanded distribution of broadcast television programming be promoted for all American households under the mandate of the 1992 Cable Act.

Comments filed by others in this docket confirmed the need for restrictions on the right of "originating stations" to grant or withhold "retransmission consent" and prohibition of involvement of any party other than that station in the consent process. Both measures are necessary so that hundreds of thousands of domestic cable subscribers do not lose their only access to network broadcast television that is distributed by ABC, CBS and NBC to the overwhelming majority of households throughout the country.

A. Delivery of Network Television to Hundreds of Thousands of Domestic Cable Households is in Jeopardy

As explained in its initial Comments, PrimeTime 24 is responsible for the delivery of network broadcast television to approximately 400,000 cable households in the states, trusts, territories and possessions of the United States. Well over half of those homes are located in Puerto Rico and the U.S. Virgin Islands.[1]

In separate Comments in this matter, representatives of cable operators that distribute PrimeTime 24 signals throughout Puerto Rico stated that approximately 260,000 households on the island depend exclusively on PrimeTime 24 for network broadcast television service.[2] Comments filed in this docket by the cable operator that serves the islands of St. Thomas and St. John in the United States Virgin Islands also pointed out that PrimeTime 24 signals are the sole source of CBS and NBC programming for over 15,000 cable subscribers located on those islands.[3]

Neither of the above mentioned commenters have adequate alternative sources for network broadcast television service purchased from PrimeTime 24. There are no network affiliate stations that serve Puerto Rico, and St. Thomas and St. John are served only by an affiliate of ABC. Those circumstances are typical of all of the cable customers of PrimeTime 24 that depend on it for delivery of network broadcast television service. Should any consent be required for continued retransmission of network broadcast signals to those operators, it could result in a "void of network television service" to those cable subscribers who depend on PrimeTime 24 service.[4]

In its initial Comments, PrimeTime 24 raised the possibility that network television service to hundreds of thousands of cable households could be eliminated in the event "retransmission consent" is required for its signal distribution to "unserved" cable operators. That possibility is now confirmed in this proceeding by the concern voiced by representative cable operators that serve over 270,000 domestic households.

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[1]Comments of PrimeTime 24, page 2.
[2]Comments of Puerto Rico Cable TV Association, page 2.
[3]Comments of Caribbean Communications Corp., page 6.
[4]Supra, page 5.

B. Special Regulation of the Terms of Exercise of Retransmission Consent Rights by Network Television Stations Is Necessary

One of the principle purposes of the 1992 Cable Act was to promote and expand distribution of broadcast television by domestic cable operators.[5] That focus was simply an extension of longstanding communications policy that promotes distribution of free over-the-air television throughout the country; policy grounded in our system of nationwide broadcast television licensing as supplemented by compulsory licensing of non-broadcast distribution.

As suggested by PrimeTime 24 in its earlier Comments, the Commission should not allow originating stations to withhold consent to the retransmission of its signal in the event such a denial results in the unavailability of network broadcast television service to any domestic consumers.[6]

Pursuit of the public interest in the formulation of retransmission consent regulation requires special protection of hundreds of thousands of cable households across the country that have no source of network telecasts other than satellite delivery. That small percentage of all of television households will be shut off from access to news, sports and entertainment programming that 90 million other American households take for granted, unless regulations are framed as discused in the initial Comments filed by PrimeTime 24.[7] There is no conflicting public interest. There is no reasonable opposing commercial interest that is not already accommodated under existing Commission rules.

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[5]Section 2(b)(1) of the 1992 Cable Act.

[6]PrimeTime 24 also agrees with the alternative suggestions by the cable operators that serve Puerto Rico and the United States Virgin Islands that PrimeTime 24 delivered signals should be exempt from retransmission consent obligations under the terms of Section 325(b)(1) of the Communications Act.

[7]Comments of PrimeTime 24, pp. 7-10. As in its initial comments, PrimeTime 24 offers its views of retransmission consent regulations in this proceeding while preserving all rights to present arguments elsewhere that this section of the Act is invalid and unenforceable.

II. Copyright Owner Interest In Retransmission Consent

A. Owners of Copyrighted Works Have No Right to Intercede In the Consent of an Originating Station to the Retransmission of Its Signal

PrimeTime 24 was not alone in suggesting that program suppliers have no standing in the retransmission consent process. The Commission was inundated with comments from a wide range of participants in this docket that said that only the "originating station" has the right to grant or withhold consent for the retransmission of its television "signal."[8] And with good reason. The plain language of Section 325, as amended by the 1992 Cable Act, supports that interpretation. Past treatment of retransmission consent rights under Section 325 of the 1934 Communications Act comports with that position. The legislative history of the 1992 Cable Act clarifies and confirms that conclusion, and the overall purpose of the 1992 Cable Act is furthered by that limitation. Support for all of the foregoing is discussed in detail in the existing record in this proceeding.

In contrast to that collective reasoned position, a handful of commenters representing owners of copyrighted works offered the contrary position that consent to the retransmission of broadcast "signals" is solely a matter for private agreement. Leading the pack in that regard is the Motion Picture Association of America ("MPAA") which effectively offered that the only issue the Commission needs to consider in this regard is how to protect the contract rights of individual program owners.

MPAA suggests that the Notice in this proceeding is "flat wrong" in its analysis of the import of Section 325(b)(6). It suggests that the only guiding principals for regulation of retransmission consent under the terms of the Act are that the contractual intent of program suppliers is "absolute" and that it must prevail over any rights created in Section 325(b)(1)(A).[9]

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[8]See Comments filed by: Cole, Raywid & Braverman (p. 32); CBS Inc. (p.17); National Cable Television Association (pp. 37-39); National Broadcasting Company, Inc. (pp. 4-5); National Association of Broadcasters (pp. 51-54); Tel-Com, Inc. (pp. 40-42) and Tribune Broadcasting Company (p. 5).
[9]Comments of the Motion Picture Association of America, Inc., page 3.

The position taken by MPAA and other programming interests is "flat wrong". Nothing in Section 325(b)(6) raises the rights of contracting parties to a level of superiority over either the retransmission consent rights of an originating station or distribution rights under the existing Cable Compulsory License. Rather, reference to "existing or future video programming licensing agreements" in that subsection is made only to the extent Congress did not want retransmission consent rights to affect copyright ownership interests associated with those agreements. Congress was simply attempting to provide that copyright interests in the programming involved would not be affected either in the supply of programming to originating stations or in the distribution of "signals" under the compulsory license.

MPAA goes even further. It also suggests that the Commission is not directed or even "best equipped" to resolve any disputes over this interpretation.[10] PrimeTime 24 disagrees with that view. Congress expressly directed the Commission to implement rules that would, by their nature, resolve any differences or ambiguities in the language of the Act. Congress intended to create a right in originating stations, similar to consent rights that have existed under Section 325 of the 1934 Communications Act for some time, without affecting or modifying copyright interests in programming. That intent is clear from a reading of the entire Act as opposed to portions of subsections of the Act. To the degree there is tension between provisions of the Act, PrimeTime 24 respectfully submits that the Commission, not program suppliers, has been selected by Congress to resolve any tension, in favor of distribution of free over-the-air broadcast television programming.

B. Copyright Owner Interference With Station Consent Would Improperly Modify and Effectively Eliminate the Cable Compulsory License

Not only do program suppliers lack standing in the retransmission consent process by virtue of the plain language of the Act, any involvement by those suppliers runs afoul of the admonition in Section 325(b)(6) that the Cable Compulsory License be left otherwise unmodified by retransmission consent implementation.

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[10]Supra, page 4.

The inescapable result of involvement of program suppliers in the retransmission consent decisions of originating stations is that program suppliers would be in a position to veto any distribution of the affected signal under the Cable Compulsory License.[11] In its Comments in this proceeding, the United States Copyright Office recognized the possibility of that result as well.[12]

MPAA fails to offer any explanation of how its interpretation of Section 325(b)(6) results in an "unmodified" cable compulsory license.[13] That failure is not surprising. MPAA's view of retransmission consent rights is simply a further expression of its disdain for the Cable Compulsory License itself. If it had its way, MPAA would do away with that license and force all who depend on compulsory distribution of broadcast programming to live or die at the myriad altars of the program suppliers. The problem with that interpretation is that it does not conform with purpose of the 1992 Cable Act; it misreads the import of Section 325(b)(6) and would not only modify the Cable Compulsory License but obliterate it.

It is noted in this proceeding that the Cable Compulsory License was created specifically for the purpose of eliminating the need for program supplier consent and the distribution of broadcast signals throughout this country.[14] Congress recognized long ago that left to private licensing, broadcast television programming would not have been distributed throughout the country via non-broadcast media. It is clear that program suppliers intend to cripple the compulsory license through involvement under Section 325. They infer that one program supplier should have the power to eliminate retransmission of a signal in its entirety or that, in the alternative, a program-by-program approval process should be implemented to weed out unapproved programming. The former effectively shuts the present system of broadcast distribution down immediately. The latter simulates the absence, and thereby the elimination, of the Cable Compulsory License. The aim of the intended absolute rulers over retransmission consent is clear either way.

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[11]Comments of the National Cable Television Association, Inc., page 38.
[12]Comments of the United States Copyright Office, page 15.
[13]It is curious that MPAA believes that retransmission consent rights "collide" with the compulsory copyright license but that MPAA approval of retransmission consent does not impact the same license.
[14]Comments of National Broadcasting Company, Inc., page 8.

For example, in its Comments, Time Warner Entertainment Co., L. P. suggests that the intrusion of program supplier approval in the retransmission consent process is both justifiable and practical on a program-by-program basis.[15] Nothing in that discussion by Time Warner offers any public interest served in the new procedures it suggests. As noted, should that program-by-program process be implemented, it is extremely likely that distribution of broadcast programming under the Cable Compulsory License in any substantial degree would be rendered practically impossible.[16] It is also not clear what additional legitimate public interest is served in the implementation of the rules suggested by Time Warner, especially in light of existing protections for program suppliers under the very Commission rules it cites by example.

Every provision of the 1992 Cable Act, as clarified by its legislative history, was introduced and passed with the intention of creating new rights in the marketplace between broadcasters and cable operators without affecting copyright matters critical to the distribution broadcasting throughout this country. The Commission cannot abandon that direction now, leaving it for the courts to later extract the fox from the hen house.

C. Public Interest in the Widest Dissemination Of Broadcast Television Requires That Copyright Owners Not Be Allowed to Veto Station Consent

In its support of the program supplier position that contractual interests of those suppliers are paramount in the retransmission consent process, Fox, Inc. states "...there is simply is no valid reason for the Government to interfere with the marketplace in this regard."[17] There is every reason for Government involvement in this process. Congress did not repeal the Cable Compulsory License in the 1992 Cable Act. Involvement of individual program suppliers in the retransmission consent process would effectively do just that. Congress kept program suppliers out of the

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[15]Comments of Time Warner Entertainment Co., L.P. ,page 53-59.

[16]Program suppliers as a group have never even offered that all or substantially all programming distributed on broadcast television would or could be made available through private licensing. That void in the "marketplace" has not changed for over fifteen years and is not likely to change in the foreseeable future.

[17]Comments of Fox, Inc., page 7.

retransmission consent mix, and now the Commission must keep them out for those very basic reasons.

The Cable Compulsory License system that has been employed in this country for over 15 years. The policy basis for that license, and one of the principal purposes of the 1992 Cable Act, is to provide all Americans with news, sports and entertainment programming available on broadcast television. In the final analysis, program suppliers offer no meaningful "marketplace" alternative to the Cable Compulsory License for effective distribution of broadcast programming. Public interest can only be served by eliminating any program supplier input from the retransmission consent process.

III. Enforcement of Retransmission Consent Requirements

A. Rules Regarding Exceptions to Retransmission Consent Requirements Are Not Currently Necessary

Section 325(b)(3)(A) requests the Commission commence a rule making proceeding to consider regulations as are necessary to administer the four exceptions to retransmission consent discussed in paragraphs 46 and 47 of the NPRM in this docket. Regulations with regard to those four exceptions are not now "necessary".

In its initial Comments in this proceeding, the National Association of Broadcasters ("NAB") suggests the immediate implementation of rules primarily with regard to claims by broadcasters under Section 325 that satellite carriers are improperly selling signals to home satellite dish owners who do not reside in "unserved households" - despite the absence of existing rules for violations of Section 325 before amendment by the Act; despite the absence of any related inquiry by the Commission; and without any record of any need for such regulations.

The absence of precedent in this area is telling. Specific rules governing violations of Section 325 have not been needed in the past, and they are not needed now. The silence of the Commission on this point in its NPRM was justified.

Further, formulation of rules in this regard is not necessary as a practical matter. Any distribution of network broadcast signals outside the "white areas" is subject to well established and more than adequate forms of relief under the terms of the Satellite Home View Act of 1988 (the "1988 Act"). A readily accessible forum and sufficient relief exists for any transmission of network programming outside the "white areas" to be sure.

In addition, since delivery of network broadcast affiliate signals to cable operators is the subject of discussion in this proceeding, rules applicable to the "inappropriate" distribution of signals in that context are premature to say the least. Much is to be learned about the effect of actual implementation of the Act in the marketplace following rule making by the Commission. The Commission cannot be expected to introduce rules now for a range of circumstances that has yet been defined.

The NAB also suggests that if actual experience demonstrates that more specific rules are needed, the Commission will be free to adopt them in light of specific problems which arise. That suggestion is more applicable to current circumstances. If experience demonstrates in the future that specific rules are needed at all in this area, the Commission can adopt them in light of any problems that actually arise in the future. There is no present need for creation of rules where none have existed in similar circumstances before. It is too early for rules in this area. They are not yet necessary and the suggestion by the broadcasters to the contrary should be rejected as nonresponsive and premature.

B. Rules Proposed By NAB Are Simply an Attempt to Rewrite Copyright Law and Should Be Rejected as Such

NAB sponsors the implementation of rules in this regard under the incorrect presumption that Congress intended to create a communications-law-based remedy for retransmissions of signals of network affiliates to home dishes.[18] To the contrary, Congress included exemptions for delivery of network affiliate broadcast signals to satellite home dish owners so that the home satellite dish industry and the consumers

[18]Comments of the National Broadcasters Association, page 40.

that rely on it could continue to enjoy distribution of network programming without any additional restrictions:

> Since one of the purposes of the SHVA was to make available network programming to unserved areas, the Committee is concerned that the retransmission consent proposal not frustrate this purpose. It is the view of the Committee that the Congress should take into consideration and seriously review the potential that home satellite technology offers the American public as a competitive force in the video marketplace before allowing the statutory license to expire. (Senate Report on S. 12, p. 37.)

There is no doubt that like MPAA, the NAB and its members would like to rewrite current copyright laws under the guise of implementing the provisions of the 1992 Cable Act. In the Appendix A offered as an attachment to the Comments of the NAB, that attitude is revealed in its suggestion that an order to show cause should issue from the Commission, or that a forfeiture be immediately assessed, in any case in which a network signal is retransmitted within the "Grade B contour" of the signal of a complaining station.[19]

The NAB and its member networks and affiliates are well aware that satellite carriers have every right to distribute network broadcast television to households that do not receive a Grade B intensity signal under the terms of the 1988 Act. They are also well aware that a large number of households located within any Grade B contour are eligible to purchase satellite distribution of selected network programming from a satellite carrier since they do not receive a signal or signals of Grade B intensity.

The suggestion that a "prima facie" case be made against any satellite carrier who dares to sell within a Grade B contour belies the real intent of the broadcasters in this matter. Rather than suggesting a simple innocuous format for the resolution of future disputes, the suggestion for implementation of rules at this premature stage is nothing more then an attempt to effectively strangle home satellite distribution at the Commission by unnecessarily restricting the delivery of network programming to those who have no alternative source for it.

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[19]Supra, Appendix A, page 3.

IV. Conclusion

PrimeTime 24 respectfully repeats its request that the Commission reaffirm longstanding communications policy, as restated in the 1992 Cable Act, by providing for continued delivery of network programming to all subscribers regardless of their location. The Commission should do so by rejecting transparent requests of program suppliers and broadcasters that they be granted veto rights over retransmission consent and new remedies for copyright infringement respectively.

Respectfully submitted,
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